2016-2158

In The
United States Court of Appeals
For The Federal Circuit

NORTHWEST TITLE AGENCY, INC.,

Plaintiff – Appellant,

v.

UNITED STATES,

Defendant – Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 1:15-cv-00248-EGB, SENIOR JUDGE ERIC G. BRUGGINK.

CORRECTED BRIEF OF APPELLANT

Wayne B. Holstad
HOLSTAD AND KNAAK, PLC
4501 Allendale Drive
St. Paul, Minnesota 55127
(651) 490-9078
wholstad@titlemaster.com

Counsel for Appellant

Dated: August 3, 2016

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

FORM 9. Certificate of Interest

Form 9
Rev. 03/16

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Northwest Title Agency, Inc. v. The United States

Case No. ____________

CERTIFICATE OF INTEREST

Counsel for the:
☒ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Northwest Title Agency, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Northwest Title Agency, Inc.	N/A	N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Gary B Bodelson

05/27/2016
Date

Signature of counsel

Please Note: All questions must be answered

Wayne B. Holstad
Printed name of counsel

cc: All counsel of record

Reset Fields

Table of Contents

Page

Table of Authorities iii

Statement of Related Cases vi

Jurisdictional Statement 1

Statement of the Issues 1

Statement of the Case 1

Summary of the Argument 10

Argument I 11

IT IS NOT PROPER STATUTORY CONSTRUCTION TO INTERPRET A CONTRACT CLAUSE IN A WAY THAT DIRECTLY CONFLICTS WITH INDUSTRY PRACTICES AND WITH THE INTERPRETATION GIVEN TO THAT CLAUSE BY THE PARTIES TO THE CONTRACT 11

1. Conduct of the parties 14

2. Industry practices 19

3. The disputed contract clause is applicable only to charging HUD for the fees incurred by purchasers 23

Argument II 28

A CONTRACT CLAUSE CANNOT BE INTERPRETED IN A WAY THAT MAKES PERFORMANCE UNDER THE CONTRACT ILLEGAL 28

Argument III 33

THE ONLY REASONABLE INTERPRETATION OF THE CONTRACT IS THAT THE CONTRACT WAS LIMITED TO THE SERVICES PERFORMED AND FEES CHARGED IN CONNECTION WITH NWTA'S REPRESENTATION OF HUD AS THE SELLER 33

Conclusion 36

Addendum

Certificate of Filing and Service

Certificate of Compliance

Table of Authorities

Page(s)

Cases

Aiea Lani Corp. v. Hawaii Escrow & Title,
64 Haw. 638, 647 P.2d 257 (1982) 30

Bell v. Bruen,
42 U.S. 169, 1 How. 169, 11 L. Ed. 89 (1843) 13

Beta Sys. Inc. v. United States,
838 F.2d 1179 (Fed. Cir. 1988) 36

California v. United States,
271 F.3d 1377 (Fed. Cl. 2001) 33

Cardinal v. Merrill Lynch Realty/Burnet,
433 N.W.2d 864 (Minn. 1988) 22

Centre Mfg. Co. v. United States,
392 F.2d 229 (Ct. Cl. 1968) 16, 17

Cheaves v. United States,
108 Fed. Cl. 406 (2013) 20

Chemical Technology, Inc. v. United States,
645 F.2d 934 (Ct. Cl. 1981) 14

Dart Advantage Warehousing, Inc. v. United States,
52 Fed. Cl. 694 (2002) 18

Hensel Phelps Construction Co. v. United States,
413 F.2d 701 (10th Cir. 1969) 34

Horn v. United States,
98 Fed. Cl. 500 (2011) 36

J.B. Williams Co. v. United States,
450 F.2d 1379 (Ct. Cl. 1971)....................13

Kenneth Reed Constr. Corp. v. United States,
475 F.2d 583 (Ct. Cl. 1973)....................34

Maxwell Dynamometer Co. v. United States,
386 F.2d 855 (Ct. Cl. 1967)....................16

Metric Constructors, Inc. v. National Aeronautics & Space Admin.,
169 F.3d 747 (Fed. Cir. 1999) ....*passim*

MPE Business Forms, Inc. v. U.S.,
44 Fed. Cl. 421 (1999)....................18, 22

Prenalta Corp. v. Colorado Interstate Gas Co.,
944 F.2d 677 (10th Cir. 1991) 18

Priebe & Sons v. United States,
332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (1947) 13

Schortmann v. United States,
82 Fed. Cl. 1 (2008)....................18, 36

Singer Co., Librascope Div. v. United States,
568 F.2d 695 (Ct. Cl. 1977)....................17

United States v. Gannon,
684 F.2d 433 (7th Cir. 1981) 30

Statutes

12 U.S.C. § 2607....................29, 30

12 U.S.C. § 2608....................29, 30

28 U.S.C. § 1491....................1

41 U.S.C. § 7103....................3

41 U.S.C. § 7104(b)(1)....................1

Rules

RCFC 12 14

RCFC 56 14

RCFC 58.1 1

Regulation

Notice H 2006-12 .... 24-25, 26

Other Authorities

1 Wisconsin Practice Series (4th Edition 2014) 20

25 Minnesota Practice Series (2015-2016 Edition) 20

Restatement (Second) of Contracts (1981) 21

Arthur L. Corbin, *Corbin on Contracts* (1960) 21

Statement of Related Cases

None

Jurisdictional Statement

This case was initially filed in the Unites States Court of Federal Claims pursuant to 28 U.S.C. 1491 and 41 U.S.C. 7104(b)(1) as it is based on a contract between a private entity and a United States government agency. The case was filed timely after the Appellant's claim was denied by the contracting officer representing the Secretary of Housing and Urban Development. Judgment was entered on March 31, 2016. The Judgment was a final judgment.

The appeal was timely filed under Rule RCFC 58.1.

Statement of the Issues

1. Can the trial court rule that a contract clause is not ambiguous when that interpretation is in direct conflict with how both parties interpreted that clause during the term of the contract?

2. Is it proper for the court to interpret a contract giving meaning to a clause that is in conflict and would be considered absurd after examining evidence of industry practices?

3. When the interpretation of a contract clause makes the contract clause illegal, should that clause interpretation be rejected in favor of an interpretation that makes the contract legal?

Statement of the Case

This case is an appeal from an interpretation of three government contracts entered into between Northwest Title Agency, Inc., hereinafter referred to as "NWTA", a title agency and settlement service provider, and the Department of Housing and Urban Development, hereinafter referred to as "HUD", in 2010. The contracts consisted of a series of one year contracts with options to renew given to HUD for up to five years. HUD did not exercise its options to renew that came due in 2012 for any of the contracts. The stated purpose of the contracts required that NWTA represent HUD as its closing agent for properties sold through government insured mortgage loans for each of the three states for which contracts were given.

After the expiration of the contracts, NWTA filed a claim with the contracting officer demanding reimbursement for costs denied to NWTA by HUD for services performed for purchasers. In many of the transactions in which NWTA represented HUD, the purchasers had requested that NWTA issue title insurance on their behalf. NWTA did in fact issue title insurance for those purchasers. In Wisconsin and Minnesota, HUD allowed NWTA to charge the purchaser for the title insurance and for additional costs incurred in conducting a separate title search. HUD did not allow NWTA to charge a separate closing fee to the purchaser. In Missouri, HUD took a slightly different position regarding its contract interpretation and allowed NWTA to charge buyers for the title insurance but disallowed a separate charge for additional title search costs and expenses. Similar to the position taken by HUD in Wisconsin and Minnesota, NWTA was not permitted to charge a separate closing fee to the purchasers. NWTA raised these issues in its own motion for partial summary judgment (Appx361-409).

NWTA's claim is based on lost revenue in the amount of approximately $4,500,000.00 cumulative to all three contracts. (Appx356, Appx357, Appx360). The calculation was based on the competitive fees charged in each of those local markets. The issue of damages was not raised in NWTA's motion for partial summary judgment.

NWTA had attempted prior to the end of the contract to obtain an explanation or some type of clarification of HUD's position regarding why the additional fees were disallowed. After the expiration of the contracts, NWTA filed a claim with the contracting officer pursuant to 41 U.S.C. 7103. The contracting officer denied the claim but did not specify a contractual basis for the denial of the claim.

NWTA pursued its claim by filing an original action in the United States Court of Federal Claims. In its Amended Complaint filed June 26, 2015, NWTA alleged under separate counts lost revenue caused by the incorrect interpretation of the contract by HUD. NWTA added a separate count for reimbursement for increased payroll and other fixed costs arising from an alleged verbal modification of the Missouri contract by HUD's contracting officer mandating that NWTA hire additional staff to accommodate an increase in anticipated orders due to a backlog of HUD owned property sales in Missouri. (Appx357-360). That claim was unilaterally dismissed without prejudice by the NWTA on July 14, 2015. (Appx410).

The government moved to dismiss NWTA's Amended Complaint which the court converted to a summary judgment motion. Appx20. In its Motion to Dismiss, the Unites States argued, for the first time, that NWTA was not permitted to charge any fees to purchasers under the three agreements. This was in conflict with the position taken by HUD during the time the contracts were performed.

On March 25, 2016, Judge Bruggink issued his Opinion, Appx28, finding that the plain language of the contract barred NWTA from charging purchasers any fees for services performed for purchasers. Judge Bruggink offered that evidence of trade practices in the industry could be admitted to counter the plain meaning of the contract. The trial court was not swayed by NWTA's evidence that the fees that it attempted to charge were common and expected in the states of Wisconsin, Minnesota and Missouri. The Opinion did not address the fact that both parties had not interpreted the language of the contract provision at issue as rigidly as presently interpreted. The trial court did not address the issue that fees for services to purchasers had been approved by HUD for some, but not all charges to purchasers by NWTA, in all three contracts, which is inconsistent with the strict interpretation of the language taken by Judge Bruggink that no fees were allowed to be charged to purchasers at all.

This appeal was timely filed on May 31, 2016.

The specifics of the contracts and the relevant history and contract provisions at issue are as follows. In 2010, HUD entered into three separate contractual agreements with NWTA to conduct settlement services representing HUD as the seller of property obtained by the foreclosure of government insured mortgages. The contract for the state of Wisconsin was dated February 11, 2010. (Appx087). The contract for Minnesota was dated April 12, 2010. (Appx173). The third contract with Missouri was dated April 28, 2010. (Appx255). The contracts for Wisconsin and Minnesota were forwarded to NWTA for signature by its General Counsel, John Lindell. (Appx087, Appx173). The Missouri contract was not signed by a representative of NWTA but orders were sent almost immediately upon the forwarding to NWTA of HUD's acceptance of the written proposal originally sent by NWTA to HUD. (Appx255).

The contracts were awarded after NWTA responded to an online solicitation for a bid posted by HUD in 2009. NWTA responded to the proposal and offered to (1) issue a title report to HUD within six days of receipt of a signed purchase agreement, (2) represent HUD's interest at the closing, and (3) record the deed prepared by HUD. These services were reflected in the following contract clauses from each of the contracts (Appx090, Appx176, Appx258):

Contract Line Item Number (CLIN)	**Service Requirement**	**Estimated Quantity**	**Unit Price**	**Estimated Total Price for CLIN**
CLIN 001	Property Closing Services IAW PWS Section C.3, tasks 1-6	800	$346 Per completed closing	$276,800
CLIN 002	Recordation Services IAW PWS Section C.3, task 7	25	$46 Each	$1,150
CLIN 003	Title Search Services IAW PWS Section C.3, task 7	25	$75 Each	$1,875
CLIN 004	Incentives IAW PWS Section C.5 and C.6			$5,536
ESTIMATED TOTAL VALUE OF THE BASE CONTRACT PERIOD				$285,361

FIRST OPTION PERIOD				
Contract Line Item Number (CLIN)	**Service Requirement**	**Estimated Quantity**	**Unit Price**	**Estimated Total Price for CLIN**
CLIN 005	Property Closing Services IAW PWS Section C.3, tasks 1-6	800	$346 Per completed closing	$276,800
CLIN 006	Recordation Services IAW PWS Section C.3, task 7	25	$46 Each	$1,150
CLIN 007	Title Search Services IAW PWS Section C.3, task 7	25	$75 Each	$1,875
CLIN 008	Incentives IAW PWS Section C.5 and C.6			$5,536
ESTIMATED TOTAL VALUE OF THE BASE CONTRACT PERIOD				$285,361

SECOND OPTION PERIOD				
Contract Line Item Number (CLIN)	**Service Requirement**	**Estimated Quantity**	**Unit Price**	**Estimated Total Price for CLIN**
CLIN 091	Property Closing Services IAW PWS Section C.3, tasks 1-6	800	$346 Per completed closing	$276,800
CLIN 0010	Recordation Services IAW PWS Section C.3, task 7	25	$46 Each	$1,150
CLIN 0011	Title Search Services IAW PWS Section C.3, task 7	25	$75 Each	$1,875
CLIN 0012	Incentives IAW PWS Section C.5 and C.6			$5,536
ESTIMATED TOTAL VALUE OF THE BASE CONTRACT PERIOD				$285,361

THIRD OPTION PERIOD				
Contract Line Item Number (CLIN)	**Service Requirement**	**Estimated Quantity**	**Unit Price**	**Estimated Total Price for CLIN**
CLIN 013	Property Closing Services IAW PWS Section C.3, tasks 1-6	800	$346 Per completed closing	$276,800
CLIN 0014	Recordation Services IAW PWS Section C.3, task 7	25	$46 Each	$1,150
CLIN 0015	Title Search Services IAW PWS Section C.3, task 7	25	$75 Each	$1,875
CLIN 0016	Incentives IAW PWS Section C.5 and C.6			$5,536
ESTIMATED TOTAL VALUE OF THE BASE CONTRACT PERIOD				$285,361

FOURTH OPTION PERIOD				
Contract Line Item Number (CLIN)	**Service Requirement**	**Estimated Quantity**	**Unit Price**	**Estimated Total Price for CLIN**
CLIN 0017	Property Closing Services IAW PWS Section C.3, tasks 1-6	800	$346 Per completed closing	$276,800
CLIN 0018	Recordation Services IAW PWS Section C.3, task 7	25	$46 Each	$1,150
CLIN 0019	Title Search Services IAW PWS Section C.3, task 7	25	$75 Each	$1,875
CLIN 0020	Incentives IAW PWS Section C.5 and C.6			$5,536
ESTIMATED TOTAL VALUE OF THE BASE CONTRACT PERIOD				$285,361

ESTIMATED TOTAL VALUE OF ALL CONTRACT PERFORMANCE PERIODS	$1,426,805

The identity of those specific tasks were accompanied by a separate fee associated with those tasks. NWTA was paid for these services. The fees for the three states varied only slightly.

The contract clause at issue is in section B. (Appx090, Appx176, Appx258). At B.4.4.3, it states “the purchaser, lender, and/or seller shall not pay any additional costs for closing services, including an additional lender fee.” Section B refers to charges payable by HUD. Section C sets forth the tasks to be performed by NWTA. There is no reference in section C to services to be performed by NWTA or HUD for purchasers (Appx093-112, Appx179-198, Appx261-280).

The initial proposal made prior to the acceptance of NWTA's proposal did not request any information regarding fees for services performed for purchasers nor did the contract identify any tasks that NWTA was obligated to perform for purchasers. It was understood that NWTA was a full service title company and intended to solicit title insurance business from purchasers of HUD property and to charge for those services. During the term of the contract, NWTA did, as did other vendors, in fact, charge fees for services for purchasers (Appx398-409).

It was standard practice, required by the contract, that NWTA would prepare the HUD-1 Settlement Statement and that, then, HUD or its agent would review and approve all fees charged by all parties and vendors involved in the transaction. It was during this process, commencing after the performance of the contract had begun, that HUD disallowed some, but not all, fees charged to purchasers. NWTA did not agree with the contract interpretation at that time but continued to perform the contract.

The contracts were stated as five successive one year terms, with each additional year after the first year to be continued only upon the exercise of an option by HUD. (Appx090, Appx091, Appx176, Appx177, Appx258, Appx259). All three contracts were extended for a second year by options exercised by HUD for the second year in 2011. (Appx149, Appx236). In December 2011, HUD exercised its option for a third year in Wisconsin (Appx160). Shortly thereafter, NWTA lost its title agency license when its underwriter terminated its contract with NWTA. As a result, HUD did not exercise third year options for Minnesota and Missouri and declared its third year option fulfilled in Wisconsin on August 30, 2012. Subsequently, NWTA demanded damages based on the disallowance of fees incurred by NWTA involving services performed for purchasers under all three contracts. These charges were incurred in almost 10,000 transactions. (Appx356, Appx357). HUD never responded to NWTA's demand, NWTA filed a claim to the contracting officer who rejected the claim without comment or elaboration. This litigation was then filed.

Summary of the Argument

The standard of review in this case involving contract interpretation is that the appellate court reviews the contract issues "without deference." *Metric Constructors v. National Aeronautic & Space Admin*., 169 F.3d 747, 751 (1999).

The interpretation of the contract clause suggested by the government in this lawsuit that the trial court accepted is in conflict with the interpretation of that clause given to it by both of the parties during the term of the contract and would be in conflict with common industry practice. The new interpretation is also in direct conflict with HUD's own rules and renders the contract clause illegal under RESPA.

The "plain meaning" contract clause interpretation given by the trial court is not reasonable or possible in reality. Purchasers are unable to obtain financing, or obtain other necessary closing services, without paying fees. The contract clause must be interpreted in accordance with contract construction principles given to ambiguous contracts. There is ample extrinsic evidence available to determine what the parties intended. If those rules are followed and extrinsic evidence is considered, the contract clause must be interpreted in favor of the Appellant. The only question remaining, not appropriate for summary judgment, is the amount of Appellant's damages.

Argument I

IT IS NOT PROPER STATUTORY CONSTRUCTION TO INTERPRET A CONTRACT CLAUSE IN A WAY THAT DIRECTLY CONFLICTS WITH INDUSTRY PRACTICES AND WITH THE INTERPRETATION GIVEN TO THAT CLAUSE BY THE PARTIES TO THE CONTRACT.

The only reasonable interpretation of the contract, after reviewing the conduct of the parties and common industry practice, is that NWTA's argument that the contract clause barring the charging of fees to purchaser's either did not apply to the transactions under these contracts or merely referred to HUD's obligation, in some circumstances, to reimburse purchasers for those fees when such reimbursement was negotiated between HUD and the purchasers. HUD had no authority or valid reason to insert into the contract a provision that no person or entity could charge the purchaser any fees for services contracted by and for those purchasers in HUD transactions.

NWTA has argued that the interpretation suggested in this litigation by the government and accepted by the trial court has to be rejected because (1) neither party to the contract interpreted the clause to mean what the government's legal counsel now argues what it says, (2) the industry standards exception to finding "patent" unambiguity was met because industry practices in Wisconsin, Minnesota and Missouri not only permit but encourage buyers to seek its own representation in real estate transactions which necessitate the existence of separate fees to sellers and buyers, and (3) the existing law governing HUD's role in reimbursing purchasers of HUD-owned property meant that NWTA could not charge HUD for fees charged to buyers unless HUD agreed to do so, and (4) the trial court's interpretation, which HUD never took while the contract was being performed, would have made the contract illegal.

The trial court was wrong in finding the contract language unambiguous. No reasonable person, informed about the practices in the industry, the fees generally charged, and the costs associated with providing the services that NWTA was providing to HUD as the seller, which was only marginally profitable, would conclude that NWTA would then absorb all other costs associated with the closing. The literal interpretation of the contract, which did not specify that NWTA couldn't charge fees, meant that no fees could be charged by anyone to purchasers. These observations and considerations cannot be ignored. The exclusion of evidence of what the parties actually did and all other evidence that could have established the intent of the parties cannot be rejected and still pretend to fulfill the primary purpose of contract interpretation - which is to fulfill the reasonable intent and expectation of the parties.

As a general rule, unless Congress has adopted a different standard, government contracts are given the same rules of construction as those same principles of general contract law. *Priebe & Sons v. United States*, 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (1947). A contract clause is defined as ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business. *J.B. Williams Co. v. United States*, 450 F.2d 1379, 196 Ct. Cl. 491 (Ct. Cl. 1971). This is based on the assumption that parties intend to make reasonable contracts, which require that courts give ambiguous contracts a reasonable construction. The aim of determining whether parties have arrived at a binding agreement as to the terms is a practical interpretation of the expressions of the parties to the end that there be a realization of the reasonable expectations of both parties. *Bell v. Bruen*, 42 U.S. 169, 1 How. 169, 11 L. Ed. 89 (1843). Similar to state law, under government contracts, the doctrine of *contra proferentum* is applied so that any ambiguity is construed against the drafter. *Chemical Technology, Inc. v. United States*, 645 F.2d 934, 227 Ct. Cl. 120 (Ct. Cl. 1981). If these rules and principles are followed in this case, the Amended Complaint cannot be dismissed under Rule 12 or 56.

1. Conduct of the parties.

Neither party interpreted, during the existence of the contract, the clause in issue as preventing NWTA from charging any and all fees incurred on behalf of its performance of duties for purchasers. Purchasers were never considered to be parties to the contract between HUD and NWTA. The contract was only directed at governing services performed by NWTA on behalf of HUD, as the seller.

In practice, HUD approved every settlement statement prepared by NWTA prior to the closing. Appx18. In Minnesota and Wisconsin, fees were disallowed for closing fees charged to purchasers, but NWTA was allowed to charge purchasers for title service fees and title insurance. The only inference that can be drawn from the record is that HUD's disallowance was based on its own interpretation that NWTA could not charge a purchaser for services that were duplicative in nature. Much of the trial court's inquiry was directed at that issue. Appx26. Neither party ever considered that the clause relied on by the district court to prevent NWTA from charging any fees was to be interpreted literally.

The distinction between the Missouri contract interpretation from the Minnesota and Wisconsin contracts, as viewed from the conduct of the parties, only demonstrates that HUD never had any set determination of what could be charged or couldn't be charged but that some fees could be charged. Under the Missouri contract, title insurance fees could still be charged. That interpretation conflicts with both the Wisconsin/Minnesota interpretation and the district court interpretation. Again, consideration could be given to a possible interpretation by HUD, as viewed from what they actually did under the contract, that there was a question as to whether charging buyers for duplicative services should be allowed. The trial court made inquiry into the nature of the services and into local practice. NWTA's explanation that sellers and purchasers required different services and did so because sellers and purchasers have separate interests was not contradicted. The actions and conduct of the parties to the transaction identify the dispute as to whether charges to purchasers were duplicative of charges simultaneously being paid by the seller. There was never any evidence that no fees should be charged. Dismissal based on a holding that the contract prevented any charges to the purchaser was inappropriate. On the other hand, summary judgment could eventually be entered in favor of NWTA.

At a minimum, the three different interpretations given during the contract performance, one by NWTA and two by HUD, creates an issue of fact that cannot be resolved by going with a new interpretation that bars all fees. The choices are limited to (1) HUD's Wisconsin/Minnesota interpretation, (2) HUD's Missouri interpretation, or (3) NWTA's interpretation. The district court interpretation that is the subject of this appeal is not an option.

The case of *Centre Mfg. Co. v. U.S.*, 392 F.2d 229, 183 Ct. Cl. 115 (Ct. Cl. 1968), is directly on point. The practical interpretation given to a government contract by both of the parties before it became the subject of controversy should be given great weight. In *Centre Mfg*., the literal interpretation of the contract was rejected. In that case, a contractor was required to manufacture a large number of raincoats to government specifications. The contract required that "the seams shall be sealed with a sufficient number of coats of seam sealant." The ASBCA had interpreted that language as requiring an "indefinite" number of coats of sealant or "as many as necessary." Even though the court found that the Board's interpretation was "based on a literal reading of the contract," because it was "obvious" that "neither party construed the contract to require a limitless number of coats of sealant", the literal interpretation was rejected. Based on both the "undisputed testimony" and "previous experience in the industry", the court observed how the parties acted under the contract. Because "great weight is given to the practical interpretation of a contract by the parties to it before the contract becomes the subject of controversy, *Maxwell Dynamometer Co. v. United States*, Ct. Cl. 386 F.2d 855, decided November 9, 1967, the Board's interpretation must be rejected as clearly erroneous" *id*. at 234.

In this case, the conduct of the parties was not seriously considered or given any weight.

The principle from *Centre Mfg. Co*. was affirmed in *Singer Co., Librascope Div. v. U.S.*, 568 F.2d 695, 715, 215 Ct. Cl. 281 (Ct. Cl. 1977). In *Singer Co.*, any deficiency or vagueness in the language in a government contract was remedied by observing the course of conduct of the parties. The court reiterated "the familiar rule that contract provisions later brought into dispute should be accorded that meaning which is reflected in the parties' conduct during performance and while their relationship was harmonious." *Id.* at 715.

In this case, the trial court accepted the government's argument that only the words of the contract should be considered in determining the intent of the parties. That argument has never had any support by the courts or legal scholars and has been rejected in all treatises on contract law. The surrounding circumstances, especially the conduct of the parties, and the interpretation they gave the clause while the contract was being performed must take precedence over an exercise in exegesis conducted in a vacuum. It is too late to give the contract a new construction two years after that interpretation is contradicted by the facts evidenced throughout performance.

The conduct of the parties is part of the overall context and surrounding circumstances that must be understood and considered in order to understand the meaning of the words in a contract. As stated in *Prenalta Corp. v. Colorado Interstate Gas Co*., 944 F.2d 677, 688 (10th Cir. 1991):

> A contract, however, does not exist in a vacuum; its terms must be understood in light of the commercial context within which it was drawn. [citation omitted] To determine the intent of the parties, the court must look to the instrument itself, its purposes and surrounding circumstances of its execution and performance. [citation omitted]

The context includes both contemporaneous circumstances and conduct of the parties. *Metric Constructors v. National Aeronautic & Space Admin.*, 169 F.3d 747, 752 (1999); *MPE Business Forms, Inc. v. U.S.*, 44 Fed. Cl. 421, 426 (1999). The trial court's allowance of evidence of industry standards alone was incorrect because that is only part of what needs to be considered. The trial court should not have simply focused on the language, but more importantly, to give the language the meaning that a reasonable intelligent person **acquainted with the contemporaneous circumstances would give it**. (emphasis added). *Dart Advantage Warehousing, Inc. v. U.S.*, 52 Fed. Cl. 694, 699 (2002), *Schortmann v. U.S.*, 82 Fed. Cl. 1, 10 (2008). The intent of the parties, which is the paramount concern in proper contract interpretation, includes more. It includes a review of the conduct of the parties, whether the contract clause was bargained for in the first place, or whether the additional clause even makes sense in the context of the contract as a whole. Those factors must also be considered and cannot be in conflict with the perceived "plain meaning" of the contract. If there is a conflict, the "plain meaning" literal interpretation must be rejected. If any of these factors are in conflict with what may appear to be the "plain meaning", the "plain meaning" rule cannot be applied. The conflict makes the clause ambiguous.

The trial court should not have required that NWTA prove that industry practices supported NWTA's interpretation that the contract did not bar the charging of fees to purchasers for services performed for purchasers because NWTA's contract with HUD did not apply to what NWTA could do for purchasers. The contract was entered into for the purpose of representing HUD as the seller. HUD approved over 10,000 settlement statements in which NWTA charges at least some fees to purchasers. It is too late to decide, after the contract is over and a lawsuit is filed, for the first time, that no fees were allowed. The government's litigation interpretation should have been rejected entirely. It is too late.

2. Industry practices.

The district court requested supplemental briefing and allowed additional evidence to determine what the industry standards were in regards to the custom and practice of companies in the same position as NWTA regarding charging fees to both sellers and purchasers. The uncontradicted evidence presented by NWTA establishes that it is customary for separate fees be charged to sellers and purchasers. The only conflict in industry practices is whether separate closing fees are charged. The difference is the custom is regional. The practice in the three states applicable to the three contracts in this case, as is customary throughout the Midwest, is that two closing fees are charged. Appx18. The regional distinction is that in some areas, such as California and Arizona, only one fee is charged. The distinction is based on the practice in those states that a separate escrow company, not acting on behalf of either the seller or purchaser, handle the transaction for both sides. That practice is not followed in Wisconsin, Minnesota or Missouri. *See, e.g., 1 Wisconsin Practice Series*, sections 4.61 – 64, 4.73 (4th Edition 2014), *25 Minnesota Practice Series*, sections 4.4, 4.7. (2015-2016 Edition).

Contrary to the assertion of the government, evidence of industry practices has to be considered prior to a finding of ambiguity in certain circumstances. *Cheaves v. U.S.*, 108 Fed. Cl. 406, 409 (2013). That point was made in *Metric Constructors, Inc. v. National Aeronautics & Space Admin.*, 169 F.3d 747 (Fed. Cir. 1999), where the Court emphasized the importance of trade practice, when it stated as follows at page 752:

> The court adheres to the principle that "the language of a contract must be given meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances". [citation omitted] Thus, to interpret disputed contract terms, "the context and intention [of the contracting parties] are more meaningful than the dictionary definition." [citations omitted] Trade practice and custom illuminate the context for the parties' contract negotiations and agreements. Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises.

> Excluding evidence of trade practice and custom because the contract terms are “unambiguous on their face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were, clear on their face. On the other hand, that context may well reveal that contract terms are, and have consistently been, unambiguous.
>
> Thus, evidence of trade practice and custom plays an important role in contract interpretation. Before arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties. That context may or may not disclose ambiguities. In any event, evidence of trade practice and custom is part of the initial assessment of contract meaning. It illuminates the contemporaneous circumstances of the time of contracting, giving life to the intention of the parties. It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretation of that bargain.

The Court in *Metric Constructors* supported its above stated determination by stating*:*

> The commentaries agree that courts should use evidence of trade practice and custom not only to determine the meaning of an ambiguous provision, but to determine whether a contract provision is ambiguous in the first instance.

The Court then cited the Restatement (Second) of Contracts, sec. 220 cmt. D (1981), and 3 Arthur L. Corbin, *Corbin on Contracts*, sec. 555 at 232-39 (1960) as authority for its conclusion. *Id*. at 753.

Numerous facts regarding industry practices were placed in the record and those facts were inserted with reference to the fact that the basis for the industry practices was well-established local law. Citations to Wisconsin law and practice, as understood by all Wisconsin real estate attorneys was buttressed by similar authority for Minnesota lawyers. In addition, the Minnesota practice made reference to a Minnesota Supreme Court case which specifically identifies what is local practice as a matter of law. *Cardinal v. Merrill Lynch Realty/Burnet*, 433 N.W.2d 864 (Minn. 1988). There **no** evidence and there is no evidence of any local practices to contradict NWTA's view. That evidence would be of practices that would probably be considered illegal in those states.

The Court in *MPE Business Forms, Inc. v. U.S.*, 44 Fed. Cl. 421, 426 (1999), also cited *Metric Constructor*s as authority to consider extrinsic evidence of trade and industry practice to determine the meaning of contract terms involving business forms. The reference in the contract to fees charged to purchasers was never part of the solicitation, negotiations or consideration by either party but was simply inserted without comment into the contract. That clause, under those circumstances, can simply be struck from the contract. There is no precedent for the suggestion that a party hiring services to assist it in the sale of property, HUD in this case, can bind its closing agent vendor to offer free services for the opposing party. That suggestion is without precedent and was never considered until after the lawsuit was started and should be ignored, rather than analyzed.

The focus on whether the contract clause is ambiguous or unambiguous distracts from the real issue. The court does not have to first determine that the contract is ambiguous before considering those industry practices which, in this case, clearly established that in the states of Wisconsin, Minnesota and Missouri, closers are generally employed, and encouraged, to represent the separate interests of both the sellers and the purchasers. Whether this informs the court as to what the clause means or, if at the same time, it shows that the clause is ambiguous, does not assist in attempting to determine the intent of the parties. The relevance of the finding that it is customary that separate fees are charged to both the seller and the purchaser just makes it abundantly clear that the clause probably doesn't make sense but, at a minimum, it shifts the burden on the government to explain it. It is reasonable for NWTA to expect and anticipate that there would be no impediment to charging separate fees to the purchaser when the contract was specifically entered into for the purpose of representing HUD as the seller. It is not NWTA's burden to explain any further what the clause was supposed to mean.

3. The disputed contract clause is applicable only to charging HUD for the fees incurred by purchasers.

The contract did not state that NWTA could not charge fees to buyers. The contract language in B.4.4.2 states that "the purchaser, lender, and/or seller shall not pay any additional costs for closing costs, including an additional lender fee." The language, strictly interpreted, is absurd. Additional fees were charged and purchasers paid for numerous additional items in every contract. The language cannot mean what the government and the trial court now claims it says when no person or entity that were actually involved in the transaction interpreted it that way. The language has to mean something different. Although it may seem difficult to piece together and reconstruct the different clauses to make the entire contract to make sense, NWTA attempted to do so by referencing the specific clauses that addressed the actual services to be performed and assumed that the broad language in B.4.4.2 must have meant something else.

The contract is HUD's contract. HUD drafted it. It is not NWTA's obligation to explain a contract provision that makes no sense, was never discussed or negotiated, and never followed literally, as the present interpretation has suggested. NWTA was aware, however, that there was a Congressional appropriation for reimbursements for the benefit of buyers for costs incurred in purchasing property. That is set forth in Notice H-2006-12 regarding what is titled "**Subject: Closing Costs Paid by the U.S. Department of Housing and Urban Development**", which is fully set forth as follows:

> **Notice H 2006-12**
>
> **Closing Costs Paid by the U.S. Department of Housing and Urban Development**
>
> This Notice supersedes Notice H 2005-12, and announces a new and simplified policy on closing costs payable by the Department on sales of single-family properties owned by the U.S. Department of Housing and Urban Development (HUD). This change is intended to align JUD home sale policies with the industry practices.
>
> Upon closing of a HUD-owned single-family property, the Department will allow to be deducted from its proceeds, purchaser financing and closing costs considered to be reasonable and

> customary in the jurisdiction where the property is located. Form - HUD-9548 (Sales contract – Property Disposition Program), shall be used to reflect the total dollar amount HUD is expected to pay towards a purchaser's financing and closing costs. However, in no event may the costs exceed three percent (3%) of the property's gross purchase price. If the total closing costs reflected on the JUD-1 settlement statement are less than the amount indicated on the sales contract, HUD will reimburse only the actual costs charged and will not credit the purchaser with any difference either in cash or through a reduced purchase price.
>
> Within the three percent (3%) allowance, HUD will reimburse loan origination fees up to one percent of the mortgage. However, on an FHA 203(k) rehabilitation mortgage loan, HUD will reimburse one and a half percent (1.5%) of the mortgage.
>
> The closing cost policy announced in this Notice shall be effective for all sales contracts executed on or after the thirtieth day following the issuance date reflected above.

Within the three percent (3%) allowance, HUD will reimburse loan origination fees up to one percent of the mortgage. However, on an FHA 203(k) rehabilitation mortgage loan, HUD will reimburse one and a half percent (1.5%) of the mortgage.

The closing cost policy announced in this Notice shall be effective for all sales contracts executed on or after the thirtieth day following the issuance date reflected above.

This document not only provides a possible explanation for B.4.4.2 but also buttresses NWTA's assertions regarding industry practices that separate closing costs are regularly paid by purchasers. Standing alone, B.4.4.2 cannot be interpreted in a way that withstands any scrutiny. The clause has to be interpreted in connection with industry practices and with the rest of the contract, HUD's own stated policies, and the reasonable expectations of both NWTA and HUD prior to entering into the contracts, as well as their conduct in performing the contract. HUD's present interpretation fails on all of these principles of contract interpretation.

Government contractors are expected to be knowledgeable of the applicable statutes, regulations and precedents applicable to the contract in which they entered. Government contractors are also entitled to rely on those statutes, regulations and precedents in the performance of those contracts. The government, at the same time, are not entitled to disregard those same statutes, regulations and precedents and then unilaterally and spontaneously make up their own rules.

The only published notice and guide to interpret HUD's role and responsibilities, cited above, regarding the sale of HUD-owned properties was published online as Notice 2006-12. Notice H 2006-12 was issued September 12, 2006 and is the last published statement on the subject of HUD's viewpoint regarding closing costs allowed on the sale of HUD-owned property. That notice provided the guideline on the amount of purchaser's costs could be deducted from HUD's proceeds at closing. HUD did not permit any deduction of purchaser's closing costs from its proceeds on any of the over 10,000 transactions closed by NWTA.

It is reasonable to assume that HUD's insertion into the contract a provision disallowing closing costs to be deducted from HUD's proceeds is consistent with its actual practice of not allowing that deduction during the course of the performance of the contract. That interpretation is the most reasonable interpretation of that clause when the actual course of conduct is reviewed. It certainly converts the contract clause language from being considered as patently unambiguous to at least latently ambiguous. Once that principle of contract interpretation is adopted, only NWTA's interpretation can be accepted. All principles regarding the construction of ambiguous contracts supports NWTA's alternate interpretations that either the clause applies to HUD reimbursement of costs to purchasers as an inducement to purchase HUD owned property or that it simply doesn't mean anything.

HUD had no identifiable interest in limiting fees charged to purchasers. HUD did have an identifiable interest in limiting fees that it would be charged for purchasers. NWTA's interpretation that the clause meant that HUD couldn't be charged fees for purchasers is consistent with the law and actual practice. NWTA's interpretation, which makes sense, should not be discarded for an interpretation that makes no sense.

Argument II

A CONTRACT CLAUSE CANNOT BE INTERPRETED IN A WAY THAT MAKES PERFORMANCE UNDER THE CONTRACT ILLEGAL.

The interpretation of the contract clause essentially promises purchasers of HUD properties that NWTA will close the transaction for them and issue title insurance policies to them for no charge. While it is obvious that no reasonable title insurer would do that and neither HUD nor NWTA ever actually considered that practice as reasonable or part of the contract until after NWTA sued HUD, this new interpretation virtually guarantees that all purchasers will select NWTA as their title insurer. It would have been a RESPA violation for HUD to require any purchaser to use NWTA as a title insurer or settlement agent. Literally interpreted, the contract interpretation now suggested would violate the statute that prevents the seller from directing title business but also violates the statute prohibiting kickbacks, rebates and discounts to steer title business. The offer of free closings made it virtually impossible for purchasers to use another company. Even though NWTA was giving away the free services, if that had been the intent, NWTA would have been subjected to being sued under RESPA, a statute that historically NWTA had vigorously attempted to enforce. HUD potentially benefitted from that arrangement. HUD could also have been sued. Neither HUD nor NWTA was required to act in a way that would have made them co-defendants in a RESPA class action lawsuit.

The RESPA statute is technically known as the Real Estate Settlement Procedures Act and the relevant sections are set forth in Title 12 of the United States Code § 2607 and 2608. The specific provisions of concern to NWTA are as follows:

> 12 USC 2607
>
> (a) BUSINESS REFERRALS
> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) SPLITTING CHARGES
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed
>
> 12 USC 2608
>
> (a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

It is important to note that HUD never actually made the argument that no fees could be charged to buyers when the contract was in force. There is no suggestion that either party actually violated RESPA. But they would have if they would have understood the contract in the way that the government is presently advocating. It is unreasonable and a little disingenuous to reinterpret a contract provision in a way that would have violated the law to avoid paying damages for its own breach of contract. In fact, it was always understood that NWTA and any other vendor assisting the buyer could charge fees to those buyers.

RESPA refers to the Real Estate Settlement Procedures Act which was first enacted in 1974 and amended in 1983. RESPA is applicable in tow contexts. One, the seller in a transaction cannot direct title insurance to a specific company. 12 U.S.C. sec. 2608. Two, RESPA prohibits kickbacks and rebates in exchange for the referral of business. 12 U.S.C. sec. 2607. 12 U.S.C. 2607 is referred to as Section 8 of RESPA and provides in part:

> (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) No person shall give and no person shall accept any portion, split or otherwise of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

A discount for title insurance is considered a “thing of value”. *Aiea Lani Corp. v. Hawaii Escrow & Title*, 64 Haw. 638, 647 P.2d 257 (1982). A RESPA violation does not have to be written or verbal but can be inferred from a course of conduct. *United States v. Gannon*, 684 F.2d 433 (7^{th} Cir. 1981). In this case, the course of conduct establishes that neither party wanted to violate RESPA. HUD’s problem, in this case, is that their new interpretation of the contract puts their RESPA violation in writing.

The language now interpreted that would have required NWTA to not charge for any services performed for purchasers would have subjected both NWTA and HUD to an extreme risk that two statutes could be violated. Both HUD and NWTA and could have been sued by implicitly requiring buyers to use NWTA as the title insurance provider at the direction and inducement of HUD and both HUD and NWTA could have been sued for giving a thing of value to purchasers for using NWTA as the title insurance provider. The fact that neither was ever sued is evidenced by the actual facts that the contract was never interpreted that way.

HUD cannot take the position that the statute does not implicate them as the seller. The contract mandated that neither party could violate RESPA. Sec. C.4.3 (Appx101, Appx187, Appx269) states under the heading "Task 3: Closing Activities" that:

> HUD's buyers may a t all times be assisted by their own advisors and attorneys and may choose their own closing agent to represent their interest in the transaction.

Section H.3 (Appx119, Appx205, Appx286) of the contracts states under the heading "Prohibitions" that:

> Title Services. HUD and its agents shall not require directly or indirectly, as a condition of sale of closing that title insurance covering the property be purchased by the buyer from any particular

> title company. The contractor shall inform the buyer in writing of opportunities to purchase title insurance from multiple firms.

The cited provision makes it clear that HUD and NWTA were both contractually bound not to interfere with or influence the relationship between the buyer and any closing agent. The new interpretation given to the buyers' costs provision does exactly that. While there is nothing wrong with directing title insurance to a title company that it is paying for, it is not permissible to induce a buyer to use a specific title company to get out of paying fees already allocated by Congress in order to save itself money. That is what HUD's new argument attempts to do. *See,* Unites States Department of Housing and Urban Development Informal Opinion Number 179 (January 26, 1983).

There is no question that NWTA's concerns that the reduction of fees to induce purchasers to purchase title insurance or use NWTA as the settlement agent created a potential RESPA problem for NWTA. Whether NWTA, it could be argued, could have successfully defended itself in a REPSA lawsuit is irreconcilable with the contract.

There was language in the contract that made it clear that HUD believed that it had an interest in making sure that NWTA did not violate RESPA.

The current contract interpretation, adopted by the trial judge, would have required that NWTA risk violating a federal statute that would have exposed it to treble damages, attorneys' fees, and criminal liability. That interpretation has to be rejected. The specific offending clause should be stricken and declared void as a matter of law. *California v. U.S.*, 271 F.3d 1377, 1384 (Fed. Cl. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable".) Whether the interpretation given to the clause during the term of the contract is still problematic. But that interpretation cannot be resolved in a Motion to dismiss or Summary Judgment. If the surrounding circumstances were considered, HUD's previous interpretation should also be rejected.

Argument III

THE ONLY REASONABLE INTERPRETATION OF THE CONTRACT IS THAT THE CONTRACT WAS LIMITED TO THE SERVICES PERFORMED AND FEES CHARGED IN CONNECTION WITH NWTA'S REPRESENTATION OF HUD AS THE SELLER.

The clauses in the contract that must be reconciled with B.4.4.4 are C.2.2 and C.4.2 and C.4.3. Nowhere is there any reference to title insurance. NWTA had no basis to interpret the contract language in B.4.4.4 to prevent them from charging for title insurance. C.4.2 and C.4.3 specifically identify the tasks that NWTA was required to perform. All of the enumerated tasks identified services commonly performed for sellers. Title insurance is not an obligation of the seller unless the seller specifically includes that subsidy in the purchase agreement. There was never any notice given to NWTA that the representation of buyers was part of the contract. As stated previously, that would have been virtually impossible and highly illegal. These clauses, read together as a whole, show that the tasks assigned to NWTA was to conduct a preliminary title search for HUD, prepare the closing statement, record the deed, then disburse the funds.

It was the obligation of HUD to make it clear and explicitly give notice what the contract clause intended. *See*, *Kenneth Reed Constr. Corp. v. United States*, 475 F.2d 583, 201 Ct. Cl. 282 (Ct. Cl. 1973) (the subjective, unexpressed intentions of a party to a government contract are not binding on the other. "If it was the intention of the government to alter existing trade practices . . . it had the obligation to so state in clear and unambiguous language."). The solicitation of the bid did not identify that the bid was for anything other than to represent HUD's interest as the seller. *Hensel Phelps Construction Co. v. United States*, 413 F.2d 701, 705 (10th Cir. 1969) (Contractor has the right to rely on the original plans and specifications and cannot be required to undertake additional burdens not clearly expressed without additional compensation.) Even if HUD had intended at the time of the agreements to the current interpretation, they wouldn't be entitled to do so without making that clear in the contract.

The HUD-1 Settlement Statement, which NWTA was required to prepare, identifies a separate column for costs payable by the seller and costs payable by the buyer. It is reasonable to interpret that language in B.4.4.4 that HUD would not pay buyers costs. That is the only reasonable interpretation that can survive the only other possible construction that would mandate that the contract clause be stricken. Either way, NWTA's argument that it was wrongfully prevented its contractual right to charge buyers fees for the purchase of title insurance, and the costs of conducting a separate title inquiry and preparation of additional services required in the preparation of title insurance, prevails.

Buyers fees when financing a real estate purchase can be thousands of dollars. These fees can include lenders commissions, both origination fees and points, real estate commissions, appraisals, property insurance, surveys, property inspections, among other items. The current interpretation is that the buyer can't be charged for any of these items. In fact, buyers were charged for all of those items. NWTA is only requesting that it should have been allowed to charge for the title insurance and services performed for the buyers, an insignificant total compare with the fees which HUD permitted to be charged which it now alleges were not allowed.

It is significant that the contract term interpretation raised by HUD to dismiss the Complaint was not part of the negotiations or bargained for or material to the services subject to the original bid proposal. That new provision, then, should, have been stricken from the contract. Instead, during the performance of the contract, it was simply ignored by both of the parties to the contract. NWTA discussed at length a possible construction of the contract that made sense and should, at a minimum, created an ambiguity sufficient to eliminate the "plain meaning" rule as a way to bar additional extrinsic evidence that support the Appellant's arguments. Contract language is ambiguous when it is susceptible of more than one interpretation, *Schortmann v. U.S.,* 82 Fed. Cl. 1, 10 (2008), and extrinsic evidence is admissible to resolve the ambiguity. *Id.* at 10. When it is found that a contract term is ambiguous, summary judgment is not appropriate. *Horn v. U.S.*, 98 Fed. Cl. 500, 503 (2011), (citing *Beta Sys. Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988)).

Conclusion

The Amended Complaint should not have been dismissed. It was not a proper interpretation of the contract to rely on a contract construction never contemplated by either party to the contract when the contract was being performed. The general rules of contract construction require the court to consider the conduct of the parties, industry standards and the reasonable expectation of the parties, which it did not in this case.

Respectfully,

Holstad and Knaak, PLC

/s/ Wayne B. Holstad

Wayne B. Holstad
Attorney for Appellant
4501 Allendale Drive
St. Paul, MN 55127
(651) 490-9078

Addendum

Addendum

Page

Opinion of
The Honorable Eric G. Bruggink
filed March 25, 2016..Appx001

Judgment
filed March 31, 2016..Appx009

In the United States Court of Federal Claims

No. 15-248C
(Filed: March 25, 2016)

* *

NORTHWEST TITLE AGENCY, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* *

Motion for Summary Judgment; Contract Interpretation; Unambiguous language; Extrinsic Evidence; Trade Practice

Gary Bruce Bodelson, Minneapolis, MN, for plaintiff.

Amanda L. Tantum, United States Department of Justice – Civil Division, Washington, DC, for defendant.

OPINION

BRUGGINK, Senior Judge

This is a suit alleging a breach of contract by the United States. Plaintiff, Northwest Title Agency, Inc. ("NWTA"), seeks $4,242,850 to compensate for revenue lost when it was denied the opportunity to charge closing fees to homebuyers purchasing foreclosed property from the Department of Housing and Urban Development ("HUD"). Pending is defendant's motion for summary judgment pursuant to Rule 56 of the Rules of the Court of Federal Claims ("RCFC"). For the reasons set forth below, the court grants defendant's motion.

BACKGROUND

A. Factual Background[1]

In early 2010, NWTA and HUD entered into three contracts pursuant to which NWTA would provide real estate property sales closing services for single family properties owned by HUD.[2] The contracts set forth numerous Contract Line Item Numbers ("CLINs") by which NWTA would be paid a set amount for each CLIN. *See* Def.'s. Appx. 16. ("As total compensation for all services performed under this contract, the contractor will be paid according to the . . . [CLIN] prices listed below.") The contracts noted that the unit price per closing "shall be inclusive of all costs." *Id.* at 16. (emphasis in original). The contracts further stated that "[e]xcept as explicitly allowed in Paragraph C.4.4.2.2 below, the purchaser, lender, and/or seller shall not pay any additional costs for closing services, including an additional lender fee." *Id.* at 17.

NWTA alleges that, throughout the entire duration of the contracts, for closings in Missouri, HUD refused to allow NWTA to charge any fees to homebuyers for any closing services, Am. Compl. ¶¶ 7, 17, 23, and that for closings in Wisconsin and Minnesota, HUD refused to allow NWTA to charge any fees to buyers for the physical closing during which the sale documents were presented, executed, and notarized." *Id.* ¶¶ 13, 19.[3] NWTA contends that the prohibition on charging a fee to buyers of HUD-owned homes was in contravention of typical industry practice and constituted a breach of the contracts, which it believes unambiguously allows for charging buyers closing fees.

---

[1] The facts are drawn from the parties' briefs and are not in material dispute.

[2] The first contract, C-DEN-02376, was signed on February 11, 2010, and applied to the geographic area of Wisconsin. Contract C-DEN-02375 was signed on April 12, 2010, and applied to the geographic area of Minnesota. Contract C-DEN-02363 was signed on April 28, 2010, and applied to the geographic area of Missouri. Although the contracts differed with regard to the amount of services estimated and the price for each service to be paid to NWTA, the three contracts were otherwise identical as to their provisions and organization. Thus, when the court refers to a specific section, that section is identical across all three contracts.

[3] These allegations are raised in the amended complaint in Count I. Count II sought the recovery of additional costs incurred by NWTA when it maintained increased staffing levels to handle an increased volume of closing orders to be (continued...)

B. Procedural Background

NWTA filed its complaint on March 10, 2015. Defendant filed a motion to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6) on May 12, 2015. NWTA then filed an amended complaint on June 26, 2015. On July 14, 2015, defendant filed the instant motion, then styled as a motion to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). On December 4, 2015, the court held oral argument on defendant's motion. Subsequently, the court ordered that defendant's motion be converted into a motion for summary judgment pursuant to RCFC 12(d) and allowed supplemental briefing. ECF No. 20. The matter has now been fully briefed and is ripe for disposition.

DISCUSSION

The central issue to be resolved by the court is whether the contracts are ambiguous as to whether NWTA is permitted to charge closing fees to purchasers of HUD-owned single family houses. If the contracts clearly prohibit charging purchasers with additional closing fees, then HUD could not have breached the contract when it prevented NWTA from charging such fees. Defendant argues that the contracts unambiguously provide NWTA with compensation for all services related to closings but prohibit NWTA for seeking compensation, a second time, from homebuyers. Defendant further argues that the only exception to this rule is provided by Section B.4.2., which allows a contractor to seek additional fees when a property is being sold subject to the Asset Control Act ("ACA"). Since NWTA never alleges that any of the costs it seeks to now recover arose from the sale of ACA properties, defendant contends that NWTA was not entitled to additional compensation of any kind for services provided related to closings under the contracts.

(...continued)
received from HUD based on modifications to the contracts. On July 14, 2015, plaintiff voluntarily dismissed this claim. ECF No. 11. Only Count I of the amended complaint remains before the court.

Case: 16-2052 Document: 28 Page: 50 Filed: 08/03/2016

NWTA, on the other hand, argues that the contract is unambiguous in favor of NWTA. NWTA asserts that "the purpose of the contracts was to represent only HUD as seller" and that "buyers were never included as parties to the contracts between HUD and NWTA." Therefore closing services provided under the contracts at issue would be only for HUD as the seller of the properties irrespective of any services that might be provided to the buyers/lenders, according to plaintiff. NWTA further asks the court to consider extrinsic evidence of industry practices before determining whether an ambiguity in the contract language exists. NWTA offers the affidavit of Wayne Holstad, its Chief Executive Officer, for the proposition that it is customary within the title insurance and settlement service industry for a single entity to represent both the buyer and the seller in a transaction and for that entity to receive payment from both parties to the transaction.

The starting point for any contract interpretation is the plain language of the agreement. *Foley v. United States,* 11 F.3d 1032, 1034 (Fed. Cir. 1993). A contract's language "must be considered as a whole and interpreted to effectuate its spirit and purpose, giving reasonable meaning to all parts." *Hunt Constr. Group, Inc. v. United States,* 281 F.3d 1369, 1372 (Fed. Cir. 2002). If the language of the contract is clear and unambiguous, the court's review is generally limited to the contract itself. *See Teg-Paradigm Envtl., Inc. v. United States,* 465 F.3d 1329, 1338 (Fed. Cir. 2006) (unambiguous language "must be given its 'plain and ordinary' meaning and the court may not look to extrinsic evidence to interpret its provisions.") ("*Teg*"). Ambiguity arises when a contract is susceptible to more than one reasonable interpretation. *Id.* (citing *Edward R. Marden Corp. v. United States,* 803 F.2d 701, 705 (Fed. Cir. 1986)).

Although review of an unambiguous contract is generally limited to the contract itself, there are exceptions to the rule. One such exception is where trade practice and custom may inform the meaning of an otherwise unambiguous term. *Teg,* 465 F.3d at 1338 ("Even when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence—evidence of trade practice and custom.") (citing *Hunt,* 281 F.3d at 1373). The Federal Circuit has held that "evidence of trade practice may be useful in interpreting a contract term having an accepted industry meaning different from its ordinary meaning—even where the contract otherwise appears unambiguous—because the parties to a contract . . . can be their own lexicographers and . . . trade practice may serve that lexicographic function in some cases.'" *Hunt,* 281 F.3d at 1373 (quoting *Jowett, Inc. v. United States,* 234 F.3d 1365, 1368 (Fed. Cir. 2000)).

After examining the language of the contracts, the court agrees with defendant that the contracts unambiguously prohibit NWTA from charging buyers additional costs for closing services. Section B.4.4.1 reads, in pertinent part:

> As total compensation for all services performed under this contract, the contractor will be paid according to the Contract Line Item Number (CLIN) prices listed below for closings conducted. The unit price per closing specified herein shall be inclusive of all costs, including, but not limited to: the cost of all labor; supervision; fringe benefits; . . . any and all licenses, insurance, certificates or permits as stated in Section C, Paragraph 4.1.2; and all office requirements unless otherwise specifically identified in this contract.

(Emphasis in original.) Section B.4.4.2 further provides: "Except as explicitly allowed in paragraph C.4.2.2 below, the purchaser, lender, and/or seller shall not pay any additional costs for closing services, including an additional lender fee." The meaning and intent of these two sections is clear and unambiguous: NWTA is to be paid according to the listed CLINs for all services performed under the contract and may not charge any purchaser, lender, or seller any additional costs for closing services. Although Section B.4.4.1 provides an extensive list of services, it is not meant to be exhaustive, as evidenced by the language "shall be inclusive of all costs, including, but not limited to." Thus, any services rendered on behalf of buyers, although not explicitly listed in the price schedule, are included under this expansive language.

Furthermore, Section B.4.2.2 explicitly states that a purchaser, lender, and/or seller shall not pay any additional costs for closing services. The one exception, as noted in Section B.4.2.2, is Paragraph C.4.4.2.2, which provides in relevant part:

> The Contractor's unit fee includes the cost of document preparation of the deed, preparation and recordation (see 4.5.3) of any applicable security documents that name seller as the secured party, the HUD-1 closing statement, and any other document requested by HUD. The purchaser will pay all other

> closing costs, including recording fees and other costs related to the purchaser's acquisition.

Although this section allows NWTA to charge purchasers for closing costs, the location of this section within the contract as a whole makes clear that it only applies to properties covered by an ACA Agreement. Section 4.4 of the contracts is entitled "Special Programs" and outlines unique steps that the contractor must take when dealing with property under two specific government programs: the Good Neighbor Next Door program (4.4.1) and the Asset Control Area program (4.4.2). It is clear from the organization of the contract that the ability to charge purchasers for closing fees was intended to apply only to situations in which the property being sold was covered under an ACA Agreement, presumably because such properties require additional work to be done beyond what would normally be expected for non-ACA properties. The general rule that additional fees cannot be charged is presented at the beginning of the contract and specifically lists the only exception to this rule. That exception is located under a section number which discusses only special programs. It follows then that the only time it was contemplated that NWTA could charge buyers additional fees was in an instance of that one listed exception.

NWTA argues that this section is actually unambiguous in allowing NWTA to charge purchasers closing fees. NWTA avers that "[t]he plain language of the contracts, considered in the context of the contemporaneous circumstances of the contracts . . . clearly establish[es] that NWTA was 'explicitly allowed' under the contracts to charge the buyer/lender 'all other closing costs' not referenced in Section C.4.2.2.2" and that "the contract language was not intended to limit the services which would be separately provided to the buyer, or the amount that would be customarily charged to the buyer/lender when the closing entity was retained by the buyer/lender to provide settlement services." Pl.'s Supp. Resp. 10-11. For the reasons set out above, the court rejects this argument.

NWTA further argues that the court should consider the affidavit of Wayne Holstad as extrinsic evidence to show customary trade practice and custom, namely that it is customary for a closing service agent to charge both the buyer and seller a fee if that agent represents both parties in the transaction, and that the amount to be paid to NWTA under the contracts was "only enough to pay for the closing services customarily charged to sellers, and were not sufficient to reflect any amount for closing services for buyers/lenders." *Id.*

at 9. NWTA cites to *Metric Constructors, Inc. v. National Aeronautics & Space Admin.*, 169 F.3d 747 (Fed. Cir. 1999) to bolster its argument that the court should look at evidence of trade practice when interpreting the contracts before determining if any ambiguity exists.

NWTA's reliance on *Metric Constructors* is misplaced. The instant case presents an almost identical situation to the one considered by the Federal Circuit in *Jowett*, *Inc. v. United States*, where, as here, the plaintiff contractor argued that, even if there was no apparent ambiguity in the terms of a contract, the court should look to trade practice to interpret its terms. 234 F.3d 1365, 1368 (Fed. Cir. 2000) ("[Plaintiff] reads *Metric* to support the following proposition: when the language of the contract does not reflect industry practice, the contract is ambiguous and consequently the evidence of industry practice is admissible to aid in the interpretation of the contract."). The court rejected that argument, holding that such a holding would "enable[] industry practice to create an ambiguity, even before the language of the contract is itself analyzed to determine if an ambiguity lies within the four corners of the contract." *Id.* While noting that parties to a contract can act as their own lexicographers, the court found that there was no term in the contract that had an accepted industry meaning different from its ordinary meaning nor was there a term with an accepted industry meaning that was omitted from the contract. *Id.* The court concluded by noting that "affidavits describing a supposed common industry practice . . . are simply irrelevant where the language of the contract is unambiguous on its face." *Id.* at 1369.

Here, as in *Jowett*, plaintiff is attempting to inject ambiguity into a contract when there is none. Affidavits describing the customary practice of charging fees to both sides of a transaction are irrelevant here because the contracts unambiguously prohibit the charging of such fees except when the property is subject to an ACA Agreement. Plaintiff does not point to any terms within the contracts which would have an accepted industry meaning different from their ordinary meaning. Accordingly, NWTA's affidavits provide no basis for upholding its interpretation of the contract.

NWTA's final argument is that its interpretation of the contract is consistent with the contract language as a whole. To support this proposition, NWTA cites to two contract provisions, Section C.4.3 and Section H.3. Section C.4.3 is titled "Closing Activities" and provides that "HUD's buyers may at all times be assisted by their own advisors and attorneys and may choose their own closing agent to represent their interests in the transaction."

Def.'s Appx. 28. Section H.3 is titled "Prohibitions" and provides that "HUD and its agents shall not require directly or indirectly, as a condition of sale of closing that title insurance covering the property be purchased by the buyer from any particular title company." Def.'s Appx. 46. NWTA argues that these provisions "made it clear that HUD was contractually bound not to interfere with or influence the relationship between the buyer and any closing entity which might be retained by the buyer. . . ." Pl.'s Supp. Resp. 17. Thus, "if any duty had existed in the contracts for NWTA to provide closing services to the buyer/lender . . . it would constitute a clear violation of . . . the above cited contract. . . ." *Id.* at 18.

NWTA's argument is unavailing because it does not lead to the supposed violation that NWTA alleges could arise. Purchasers could certainly take advantage of the services provided by NWTA under the government contracts. The cited provisions merely state the right of a purchaser to use a title agency of their own choosing should they so desire. Nothing in the contract can be fairly interpreted as forcing a purchaser to use NWTA's services over any other title agency.

CONCLUSION

For the reasons set forth above, the court concludes that the language of the contract is unambiguous in disallowing a contractor from charging closing fees to purchasers except in certain limited exceptions. Because NWTA has not alleged that the exception applies to any of the fees it was unable to collect from purchasers, the court holds that no breach of the contracts has occurred. Accordingly, the court grants defendant's motion for summary judgment. The clerk is directed to enter judgment accordingly.

s/Eric G. Bruggink
Eric G. Bruggink
Judge

In the United States Court of Federal Claims

No. 15-248 C

NORTHWEST TITLE AGENCY, INC.

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Opinion, filed March 25, 2016, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered for defendant, and plaintiff's complaint is dismissed.

Hazel C. Keahey
Clerk of Court

March 31, 2016 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

Certificate of Filing and Service

I hereby certify that on this 3rd day of August, 2016, I caused this Corrected Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Amanda Tantum
U.S. Department of Justice
Commercial Litigation Branch, Civil Division
Post Office Box 480, Ben Franklin Station
Washington, DC 20044
(202) 616-8131
amanda.tantum@usdoj.gov

Counsel for Appellee

Nicole A. Allard
Gabriel Lopez
U.S. Department of Housing and Urban Development
Region VIII Office of Counsel
1670 Broadway, 25th Floor
Denver, Colorado 80202
(303) 672-5027
nicole.a.allard@hud.gov
gabriel.g.lopez@hud.gov

Counsel for Appellee

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of copies of the Corrected Brief of Appellant will be hand filed at the Office of the Clerk, United States Court of Appeals for the Federal Circuit in accordance with the Federal Circuit Rules.

/s/ Wayne B. Holstad
Counsel for Appellant

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains *8,590* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: August 3, 2016

/s/ Wayne B. Holstad
Counsel for Appellant